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Conflict of Laws—Colorado Guest Statute Precluded Recovery by Guest-Passenger from her Host, Where Both Were New York Residents Temporarily Residing in Colorado

Erratum

On page 451, footnote 48 which read: *Kell v. Henderson*, 47 Misc. 2d 992, 994, 263 N.Y.S.2d 647, 649 (Sup. Ct. 1955) Should have read: *Kell v. Henderson*, 47 Misc. 2d 992, 994, 263 N.Y.S.2d 647, 649 (Sup. Ct. 1965).

it took the jury to reach its verdict would clearly indicate that the judge's instructions forced agreement rather than mature deliberation, and provided sufficient grounds for vacating the jury's verdict.

STEVEN G. BILTEKOFF

CONFLICT OF LAWS—COLORADO GUEST STATUTE PRECLUDED RECOVERY BY GUEST-PASSENGER FROM HER HOST, WHERE BOTH WERE NEW YORK RESIDENTS TEMPORARILY RESIDING IN COLORADO

Plaintiff and defendant, domiciled in New York state, were summer students at the University of Colorado and had arrived at separate times in the city of Boulder. At the time of leaving New York, plaintiff and defendant had not arranged to meet in Colorado, nor had they planned that plaintiff would ride in defendant's automobile at any time. On August 11, 1959 plaintiff entered defendant's automobile with his consent, for the purpose of being driven to Longmont, Colorado. Both parties had intended that plaintiff be driven only to that destination, and they had made no plans for any other trips. During the short ride to Longmont, plaintiff received injuries as a result of a collision with another car, registered in Kansas, and sought to recover damages from her host for his negligence. Colorado, unlike New York (whose policy allows recovery by the guest for the host's negligence), has a guest statute which precludes recovery by a guest in the absence of showing gross negligence on the part of the host.¹ The trial court,² invoking the conflict of laws rule recently defined in *Babcock v. Jackson*,³ decided as a matter of law that New York law was applicable. The Appellate Division⁴ unanimously reversed the trial court and held that Colorado law must apply. The Court of Appeals *held*, affirmed, three judges dissenting. Since the parties were dwelling in Colorado when the host-guest relationship was formed, the place of the accident was not "entirely fortuitous," and hence applying the "contacts" test of *Babcock*, Colorado law must apply. *Dym v. Gordon*, 16 N.Y.2d 120, 209 N.E.2d 792, 262 N.Y.S.2d 463 (1965).

The choice of law rule, that the place of the injury furnishes the law applicable to a tort, was embodied in the original *Restatement, Conflict of Laws*,

1. Colo. Rev. Stats. Ann. § 13-9-1 (1963): "No person transported by the owner or operator of a motor vehicle as his guest, without payment for such transportation, shall have a cause of action for damages against such owner or operator for injury, death or loss in case of accident, unless such accident shall have been intentional on the part of such owner or operator or caused by his intoxication, or by negligence consisting of a willful and wanton disregard of the rights of others. . . ."

2. *Dym v. Gordon*, 41 Misc. 2d 657, 245 N.Y.S.2d 656 (Sup. Ct. 1963).

3. 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963) (Plaintiff and defendant, both residents of New York, set out from Rochester on a trip that took them to Ontario, Canada. Plaintiff was a guest in defendant's automobile at his invitation. While in Ontario, plaintiff was injured when the automobile collided with a stone wall. When plaintiff sued in New York, defendant invoked the Ontario guest statute and moved to dismiss the complaint. *Held*, motion to dismiss complaint denied; New York law applied.) See Note, 13 Buffalo L. Rev. 138 (1964).

4. *Dym v. Gordon*, 22 A.D.2d 702, 253 N.Y.S.2d 802 (2d Dep't 1964).

section 384 (1934) and until recently, it has been substantially followed in the courts.⁵ This rule of *lex loci delicti*,⁶ which antedates the vested rights doctrine,⁷ has been criticized⁸ because it ignores the interests which jurisdictions, other than that where the tort occurred, may have in the resolution of particular issues. Similar criticism was voiced against rigid choice of law rules in the field of contracts.⁹ In *Rubin v. Irving Trust Co.*,¹⁰ a case dealing with the validity of a contract to make a will, the Court of Appeals applied the center-of-gravity test, stating that New York had the most significant contacts with the transaction involved. This test was further elaborated in *Auten v. Auten*,¹¹ where the Court stated, ". . . instead of regarding as conclusive the parties' intention or the place of making or performance, [we] lay emphasis rather upon the law of the place which has the most significant contacts with the matter in dispute."¹² The rule of *Auten* sparked a successful revolt in the field of contracts and resulted in wide-spread judicial approval of the Restatement, Second, Conflict of Laws.¹³ A similar revolt in the field of torts took place in *Kilberg v. Northeast Airlines, Inc.*,¹⁴ where a New York resident purchased a ticket from defendant airline in New York for a flight which ended in a fatal crash in Massachusetts. The Court weighed the contacts of New York and Massachusetts and concluded that the limitation of recovery prescribed by the wrongful death statute of Massachusetts should not be applied. This holding was consistent with the center-of-gravity theory, although the theory was not expressly adopted by the Court.

5. See *Reed & Barton Corp. v. Maas*, 73 F.2d 359 (1st Cir. 1934) (A coffee urn was defectively made in Massachusetts and sold in Wisconsin. The caterer, while using the defective urn, spilled hot coffee upon the plaintiff in Wisconsin. The Massachusetts federal court applied Wisconsin law to define the liability of the manufacturer); see *Kaufman v. American Youth Hostels, Inc.*, 5 N.Y.2d 1016, 158 N.E.2d 128, 185 N.Y.S.2d 268 (1959) (Plaintiff's daughter died in Oregon as a result of a fall while on a tour conducted by defendant corporation. In a wrongful death action brought in New York, defendant corporation, organized under New York law, invoked the charitable immunity doctrine recognized by Oregon but not by New York. The New York court upheld the defense based on Oregon law as the place of the injury.).

6. For an explanation of the rule of *lex loci delicti*, see Goodrich, *Conflict of Laws* 260 (3d ed. 1949); see also, Strumberg, *Principles of Conflict of Laws* 182 (2d ed. 1951).

7. For an explanation of the vested rights doctrine, see Hancock, *Torts in the Conflict of Laws* 30-36 (1942).

8. See Morris, *The Proper Law of a Tort*, 64 Harv. L. Rev. 881 (1951); Currie, *Survival of Actions: Adjudication versus Automation in the Conflict of Laws*, 10 Stan. L. Rev. 205 (1958); Ehrenzweig, *Guest Statutes in the Conflict of Laws*, 69 Yale L.J. 595 (1960).

9. See Restatement, *Conflict of Laws*, §§ 332, 334, 358 (1934).

10. 305 N.Y. 288, 113 N.E.2d 424 (1953).

11. 308 N.Y. 155, 124 N.E.2d 99 (1954).

12. *Id.* at 160, 124 N.E.2d at 101.

13. § 332 (Tent. Draft no. 6, 1960). See *Haag v. Barnes*, 9 N.Y.2d 554, 175 N.E.2d 441 (1961) (In a contest between Illinois and New York laws concerning a support agreement for an illegitimate child, Illinois law was applied as having the "most significant contacts."); *W. H. Barber Co. v. Hughes*, 223 Ind. 570, 63 N.E.2d 417 (1945) (Validity of a cognovit note upheld by using the "center-of-gravity" test.)

14. 9 N.Y.2d 34, 172 N.E.2d 526, 211 N.Y.S.2d 133 (1961) (Court refused to apply New Jersey law as the place of the tort with respect to the quantum of recovery, in a death action arising out of a fatal airplane crash, where decedent had been a New York resident and his relationship with defendant airline had originated in New York.)

Considering the array of cases involving workmen's compensation,¹⁵ torts arising out of contractual relations,¹⁶ family immunities¹⁷ and defamation,¹⁸ along with *Kilberg* and *Auten*, the groundwork for *Babcock* was well laid.¹⁹ In *Babcock*, plaintiff and defendant, both residents of New York, set out from Rochester on a trip that took them to Ontario, Canada. Plaintiff was a guest in defendant's automobile and while in Ontario, she was injured when the automobile collided with a stone wall. When plaintiff sued in New York, defendant invoked the Ontario guest statute and moved to dismiss the complaint. The Court of Appeals denied defendant's motion to dismiss the complaint and held that New York law applied.

After the *Babcock* decision, the courts of New York were not entirely clear on where *Babcock* left the New York conflicts rule relating to torts. In *Gore v. Northeast Airlines*,²⁰ relatives of a New York resident, who had been killed in an accident in Massachusetts, sought damages in a federal district court of New York for his wrongful death. On facts closely analogous to those in *Kilberg*, the court applied the Massachusetts limitation of recovery on the ground that the center-of-gravity was not located in New York, since the residences of the beneficiaries were not in New York.²¹ In some cases, the lower New York courts seemed to give little weight to *Babcock*.²² In later cases, however, *Babcock* began to exert a stronger influence on the courts' reasoning which was evidenced by a more refined articulation and application of the center-of-gravity approach (although the results obtained under these decisions would have been similar under the *lex loci delicti*). In *Fornaro v. Jill Bros., Inc.*,²³ the law of

15. See, e.g., *Alaska Packers Ass'n. v. I.A.C. of California*, 294 U.S. 532 (1935) (State where contract of employment entered into may apply its own law to out-of-state injury).

16. See, e.g., *Dyke v. Erie Ry.*, 45 N.Y. 113 (1871) (contract for carriage by rail between two points in New York but through Pennsylvania; the injury occurred in Pennsylvania by whose law recovery was limited to \$3,000; on theory of New York contract, \$35,000 allowed).

17. See, e.g., *Emery v. Emery*, 45 Cal. 2d 421, 289 P.2d 218 (1955) (Question of domestic relations and capacity to sue governed by the law of the state of the family domicile, not the place of the tort.)

18. See, e.g., *Dale System, Inc. v. Time, Inc.*, 116 F. Supp. 527 (D.Conn. 1953) (multi-state libel suit—law of the plaintiff's domicile applied).

19. Compare Currie, *Conflict, Crisis and Confusion in New York*, 1963 Duke L.J. 1, with Currie, *Comment on Babcock v. Jackson*, 63 Colum. L. Rev. 1233 (1963). For an excellent critical evaluation of *Babcock* see *Comments on Babcock v. Jackson*, 63 Colum. L. Rev. 1212 (1963), with notes by Cavers, Cheatham, Currie, Ehrenzweig, Leflar and Reese.

20. 222 F. Supp. 50 (S.D.N.Y. 1963).

21. Query: Should the residence of the beneficiaries be a determinant factor, when under modern living conditions, they are likely to be widely scattered?

22. See *Slavenburg Corp. v. Howard Sober, Inc.*, 214 F. Supp. 338 (S.D.N.Y. 1963); *Montalvo v. Morales*, 18 A.D.2d 20, 239 N.Y.S.2d 72 (2d Dep't 1963); *Ernst v. State*, 38 Misc. 2d 264, 237 N.Y.S.2d 458 (Ct. Cl. 1963).

23. 22 A.D.2d 695, 253 N.Y.S.2d 771 (2d Dep't 1964) (At time of accident, deceased with his sister and parents, residents of New York, were in New Jersey on a visit to the Jill's, who were relatives of the deceased. On the morning after arrival, deceased's aunt took him on an auto trip to the store, on which trip an accident occurred, resulting in the deceased infant's death. Decedent's parents sued corporate owner of auto on theory of vicarious liability. Held, New Jersey law applied to issue of vicarious liability.)

New Jersey was applied, with respect to the issue of vicarious liability, to an accident occurring in New Jersey which resulted in a New York resident's death. In *Manning v. Hyland*,²⁴ plaintiff, a resident of New York, was injured in New Jersey while a passenger in an automobile owned and operated by defendant, a resident of New Jersey. After the accident, plaintiff and defendant were married in New Jersey and at the time of the suit were residents of that state. The New York court granted the husband immunity under New Jersey law, discounting the plaintiff's contention that *Babcock* called for the application of New York law. In *Murphy v. Barron*,²⁵ plaintiff, a passenger in an automobile owned and operated by his wife, was injured in a collision with a trailer truck which was under the control of the defendant. Plaintiff was a resident of New York, defendant was a resident of New Jersey and the accident occurred in Pennsylvania. Defendant filed a third party complaint against plaintiff's wife, and plaintiff moved to dismiss the third party complaint on the ground that a joint judgment is a prerequisite to the right of contribution under the law of New York. The New York court denied plaintiff's motion and applied Pennsylvania law stating, ". . . the substantive right to contribution, recognized in states such as Pennsylvania, where a joint judgment is not a prerequisite, may be procedurally enforced in this state though the problem of contribution is treated differently here."²⁶ The court held that New York did not have a predominant interest or concern with the rights of the parties. The approach taken by the court in *Murphy* is similar to that taken by the Restatement, Second, Conflict of Laws.²⁷ In *Blum v. American Youth Hostels, Inc.*,²⁸ defendant, a New York corporation, conducted a tour which was to begin and end in New York. Plaintiffs, residents of New York, were members of the tour which took them to the state of Oregon. While in Oregon, an accident occurred, injuring the plaintiffs. In a suit to recover damages, defendant sought to invoke the charitable immunity doctrine then recognized by the state of Oregon, but not recognized by the state of New York. The New York court applied New York law as to the issue of immunity on the ground that New York had a dominant interest in the rights of the parties. The court emphasized the factors of domicile and basis of the relationship, and de-emphasized the factor of the relative time spent in the place of the accident. A peculiar problem arises in applying the *Babcock* doctrine to cases involving wrongful death statutes. In *Long v. Pan American World Airways*,²⁹ a Pennsylvania resident pur-

24. 19 A.D.2d 652, 241 N.Y.S.2d 908 (2d Dep't 1963).

25. 45 Misc. 2d 905, 258 N.Y.S.2d 139 (Sup. Ct. 1965).

26. *Id.* at 907, 258 N.Y.S.2d at 142.

27. § 379(a)(1) (Tent. draft no. 8, 1960). See also § 279 comment (d), which states, "When the actor's conduct and the personal injury occur in the same state, the local law of this state determines almost invariably, the rights and liabilities of the parties." Compare the approach taken in Briggs, *The Jurisdictional-Choice-of-Law Relation in Conflicts Rules*, 61 Harv. L. Rev. 1165 (1948).

28. 21 A.D.2d 683, 250 N.Y.S.2d 522 (2d Dep't 1964).

29. 23 A.D.2d 386, 260 N.Y.S.2d 750 (1st Dep't 1965).

chased an airplane ticket from defendant airlines in Pennsylvania, for a round trip to Puerto Rico and return. During the return trip, the plane disintegrated in air and fell into the state of Maryland. Defendant airline's main office is in New York, where a wrongful death action was brought. Under the Maryland statute, a cause of action lies only in favor of a spouse, child or parent of the decedent, or a person wholly dependant upon him. The court dismissed the action on the ground that the decedent left no such relative or person. The qualifying clause of the Maryland statute could not be avoided by alluding to the rationale of *Kilberg*. The court stated that, since the basis of a wrongful death action derives solely from statutes which have no extra-territorial effect,³⁰ either there is a cause of action under the *lex loci delicti*, or there is no cause of action anywhere.³¹ As stated in *Babcock* and clearly demonstrated in a recent decision handed down by the Appellate Division,³² the various issues involved in the litigation will be isolated, and the law of one of the competing jurisdictions will be applied to a particular issue in accordance with the dominance of interests and contacts referable to that issue. In *Ardieta v. Young*,³³ plaintiff was a passenger in the defendant's automobile when an accident occurred in Ontario, Canada involving an Ontario motorist. Both plaintiff and defendant were residents of New York. Settlement was effected with the Ontario motorist and the plaintiff executed a release which, under Ontario law would not release the defendant, but under New York law would release him. The court held that Ontario law applied to the release but New York law applied to the host-guest relationship. In *Brewi v. Handrich*,³⁴ an action between two New York residents for injuries sustained in Florida on a trip which began and was to end in New York, New York law rather than the Florida statute, was applied to the issue of the host's liability to his guest passenger. The Florida statute denies recovery to the guest in the absence of a showing of gross negligence on the part of the host. The facts of that case are closely analogous to those of *Babcock*, with two important differences: (1) The Ontario statute in *Babcock* completely bars the claims of a guest-passenger, while Florida permits a guest to recover from his host on a showing of "gross negligence."³⁵ (2) The *Brewi* case involved a two car collision, while in *Babcock*

30. *Whitford v. Panama R.R. Co.*, 23 N.Y. 465 (1861).

31. The result reached seems to be rather unjust considering the fact that the *Babcock* rationale was developed specifically to avoid subjecting travelers to varying state laws. Here, however, the court was dealing with a qualifying clause of a death statute, rather than a limitation of recovery clause (as in *Kilberg*), which it could not treat as remedial. Perhaps the non-extraterritorial effect of death statutes should be re-examined in the light of the purposes underlying the *Kilberg-Babcock* rationale.

32. *Ardieta v. Young*, 22 A.D.2d 349, 256 N.Y.S.2d 199 (4th Dep't 1965).

33. *Ibid.*

34. 45 Misc. 2d 121, 256 N.Y.S.2d 171 (Sup. Ct. 1965).

35. This distinction was held to be of no consequence in the *Babcock* case (12 N.Y.2d at 484, n.14). Yet it is evident that the New York courts will not be as hesitant to apply a less Draconian law, such as the Florida statute, as they will be to apply a statute that directly contravenes New York's sense of justice.

only the host's car was involved.³⁶ In *Macey v. Rozbicki*,³⁷ plaintiff was injured in a collision which occurred while plaintiff was visiting defendant at defendant's summer home in Ontario, Canada. The accident occurred while defendant was driving to church with plaintiff, and involved a Canadian car which was not involved in the suit since settlement was made with plaintiff. The New York court applied the Ontario guest statute on the ground that the facts were more akin to *Dym* than to *Babcock*. With regard to the time factor (the relative time spent by the parties in the place of the accident), the facts of *Brewi* may have involved a longer time spent in the *locus delicti* than the facts of *Macey*. However, since the host-guest relationship in *Brewi* was based in New York, New York law was applied. Had the accident in *Brewi* occurred sometime after the parties had arrived in Florida, and had they intended to spend the entire winter season vacationing or "dwelling"³⁸ there, the court might have applied Florida law.³⁹

To justify the application of New York law, the plaintiff in the instant case referred to (1) insurance written and delivered in New York, (2) registration of the automobile in New York, (3) the domicile of both parties in New York and (4) the policy of New York to compensate guest-passengers for the negligence of their hosts. The Court, in rejecting these four elements as suggesting a *quantitative* rather than a *qualitative* test, stated that by the use of those references plaintiff attempted to distort *Babcock* into a rule of domicile or one directed toward public policy. The Court, searching instead for a *qualitative* test, set forth three purposes underlying Colorado's guest statute: (1) the protection of Colorado drivers and their insurance carriers against fraudulent claims, (2) the prevention of suits by ungrateful guests and (3) the priority of the claims of injured parties in other cars to the assets of the negligent defendant. In considering which state had the superior claim for the application of its law (policy), the Court presented three factual distinctions between the instant case and *Babcock*. Initially, unlike the instant case, *Babcock* did not involve a collision between two cars. Secondly, in *Babcock* the host-guest relationship was "seated" in New York, while in the instant case, ". . . the relationship itself and the basis of its

36. Since persons or property in the state of Florida may be affected by the outcome of the suit, there is what has been referred to as a "real conflict" (as opposed to the "false conflict" situation involved in the *Babcock* case). See Currie, *Comments on Babcock v. Jackson*, 63 Colum. L. Rev. 1233; see generally Currie, *Selected Essays on the Conflict of Laws* (1963).

37. 23 A.D.2d 532, 256 N.Y.S.2d 202 (4th Dep't 1965).

38. In the first portion of his opinion in the *Dym* case, Burke, J. referred to the parties as "temporarily residing" in Colorado. However, later in his opinion, he made use of the rather ambiguous term, "dwelling." Apparently, to Burke, J., the latter carried the same meaning as the former.

39. This hypothetical fact situation has not, up to this point, come before the courts of New York, at least not in the context within which we are dealing. However, some indication is given in the majority opinion of *Dym* to support this conclusion. The Court stated, "Of compelling importance in this case is the fact that here the parties had come to rest in the state of Colorado and had thus chosen to live their daily lives under the protective arm of Colorado law In *Babcock*, the New Yorkers at all times were *in transitu* and we were impressed with the fundamental unfairness of subjecting them to a law which they in no sense had adopted." Instant case at 125, 209 N.E.2d at 795, 262 N.Y.S.2d at 467.

formation . . ."⁴⁰ was "seated" in Colorado. Since the relationship was seated in Colorado, and the accident arose out of Colorado based activity, the Court reasoned that the fact the accident occurred there could in no sense be termed fortuitous. Thirdly, of compelling importance to the Court was the fact that the parties had come to rest in Colorado, choosing to live their daily lives under the protective arm of Colorado law. The Court stated that the physical situs where the relationship was created and the time of its creation, along with the general intent of the parties, was controlling. The alleged contacts of New York referred to by the plaintiff were reduced by the Court to the one contact of domicile, and the natural incidents thereof. To give domicile such a preferred status would be to substitute a conflicts rule as inflexible as its *lex loci* predecessor. In answer to the plaintiff's reference to the policy of New York as a contact in favor of that state, and also to Chief Justice Desmond's narrow approach in his dissent, the Court stated, "Judicial hostility to 'guest' statutes and a preoccupation with New York social welfare problems . . . should not be treated as 'contacts' which are found then to outweigh the factual contacts."⁴¹ The Court further stated that public policy, *per se*, should ". . . play no part in a choice of law problem."⁴² In his dissenting opinion, Judge Fuld took the position that there is no material distinction between the factual situation in *Dym* and that in the *Babcock* case. He stated that the majority's emphasis on the involvement of another vehicle in the accident was "misplaced," since the other automobile was driven by a resident of Kansas and was apparently licensed in that state. He further stated: "Nothing turns on the circumstance that in this case the guest-host relationship was formed in the foreign jurisdiction."⁴³ Considering these two propositions in the light of the contacts of Colorado as set forth by the majority, there remains one contact in favor of that state, *i.e.*, the fact the accident occurred there. This contact, standing alone, was not sufficient to give Ontario a "legally cognizable interest" in having its policy applied in the *Babcock* case, and should not be sufficient in the instant case. On the other hand, the contacts in favor of New York are the same in the instant case as they were in *Babcock*. The public welfare argument advanced in the *Babcock* opinion was again alluded to by Judge Fuld stating, ". . . the consequences resulting from an uncompensated injury generally affect the community in which the injured party resides . . ."⁴⁴ Without doubt, the most cogent point advanced by Judge Fuld in response to the contacts in favor of Colorado alleged by the majority, was his assertion that a jurisdiction may be said to be "concerned" with a specific issue only when its governmental interests and policies enter into the making of a particular decision. Chief Judge Desmond, concurring with Judge Fuld in a separate opinion, argued that, ". . . no state

40. Instant case at 125, 209 N.E.2d at 794, 262 N.Y.S.2d at 467.

41. *Id.* at 126, 209 N.E.2d at 795, 262 N.Y.S.2d at 468.

42. *Id.* at 128, 209 N.E.2d at 796, 262 N.Y.S.2d at 469.

43. *Id.* at 131, 209 N.E.2d at 798, 262 N.Y.S.2d at 472.

44. *Id.* at 132, 209 N.E.2d at 799, 262 N.Y.S.2d at 473.

can have any discoverable 'interest' in the application of its own special public policies as to . . . tort litigations in another State between two persons, both resident of that other State."⁴⁵ The concepts of "contacts," "center of gravity" and "interests" provide no satisfactory guidelines for lower courts to decide cases and lawyers to advise their clients. Furthermore, judges will disagree as to where these interests lie. The Chief Judge's approach was apparently devoid of any evaluative process, as he stated simply that New York's policy is not to be departed from purely because the accident; affecting only New York residents, happened beyond its borders. He justified this position by declaring that the ". . . fear of being accused of making or using 'mechanical' rules should [not] deter us from developing such new decisional formulae as the need for them appears in our society."⁴⁶

Judge Fuld, in his dissenting opinion, made no mention of "fortuity," but concerned himself only with comparing the "interests" of New York and Colorado. Had the place of the accident been entirely fortuitous, the majority might have agreed that New York's interest outweighed that of Colorado, notwithstanding the fact that a Kansas car was involved. Chief Justice Desmond held that New York's policy in *cases like these* was settled by *Kilberg* and *Babcock*, yet he too discounted the fact that the instant case is not at all *like Kilberg* and *Babcock* insofar as here, the place of the accident was not entirely fortuitous. The majority in the instant case clearly stated that public policy should play no part in making the choice of law, yet the Court took pains to delineate the purposes underlying the Colorado guest statute. It is submitted that the majority might have avoided any discussion of the policies of the respective states by first dealing with the question of fortuity. Answering this question would have enabled the Court to dispose of the case without having to examine the "contacts" or "policies" of the respective states. Looking back at the array of cases preceding *Dym*, one finds that the element which sparked the revolt against the rule of *lex loci delicti* was "fortuity." How much consideration has been given to this element in the more recent decisions? The three factors underlying the fortuity concept which have been considered by the courts are: (1) the time factor, (2) the basis or seat of the relationship and (3) the intent factor (emphasized by the majority in the instant case). The chance of an accident occurring in a given jurisdiction increases as the length of time spent by the parties in that jurisdiction increases. Similarly, if the relationship between the parties was based in the *locus delicti*, then it can hardly be said that an accident occurring there was entirely fortuitous. For a host-guest relationship to be considered as "based in the locus delicti," the relationship must have originated there, and the parties must intend that it end there. Finally, if the parties had intended to spend a considerable length of time in a given jurisdiction, and an accident did in fact occur there but after only a short time, it

45. *Id.* at 135, 209 N.E.2d at 801, 262 N.Y.S.2d at 475.

46. *Id.* at 134, 209 N.E.2d at 801, 262 N.Y.S.2d at 475.

seems rather tenuous to argue that the place of the accident was entirely fortuitous. For the mere circumstance that the accident occurred after only a short time in that jurisdiction does not effect the fortuity factor, which is conceptually established prior to the accident. If the Chief Judge's plea for more satisfactory guidelines is to be answered, the courts must carefully distinguish between these factors underlying the fortuity concept and the concepts of "contacts" and "interests." In analyzing the fact situation involved in a litigation, if the court finds that the place of the accident was any less than "entirely fortuitous,"⁴⁷ taking into consideration the factors underlying the fortuity concept (not "contacts"), it should apply the *lex loci delicti*. If on the other hand, the *locus delicti* is found to have been entirely fortuitous, the court then will proceed with weighing the "interests" of the respective jurisdictions. "Contacts" seems to be a meaningless term, for only contacts that create "interests" should be considered in making the choice of law. The place of the accident is a "contact," but one of no consequence if it does not create an "interest" from a fact other than the mere occurrence of the accident there. The circumstance that parties or property of the place of the accident have been affected by the accident or may be affected by the outcome of the suit, are facts incidental to a "contact" (place of injury) and create an "interest" in that jurisdiction. Domicile, on the other hand, is a "contact" which *ipso facto* creates an "interest" in that state, *i.e.*, to settle disputes between its own citizens. Similarly, to confuse the meaning and application of the term "policies" with the term "interests" will lessen the chances of ever achieving a logically integrated rationale. After it has been determined that the place of the accident was entirely fortuitous, the "policy" of the *locus delicti* will be considered only if the "contacts" are sufficient to create an "interest" in that jurisdiction. On the other hand, it is apparent that when two New York residents are involved in an accident in another state, the "contact" of domicile itself creates an "interest" in New York, and will automatically place New York's "policy" in contention. The suggested rationale, although developed under the factual situation presented by the instant case, is not intended to be so limited. It is evident, however, that succinct guidelines cannot be established without first clarifying the concepts involved.⁴⁸

ROBERT A. SANDLER

47. *Id.* at 125, 209 N.E.2d at 794, 262 N.Y.S.2d at 467.

48. The latest case in this area apparently has misconstrued the Court of Appeals' directive as set forth in *Dym* and mistakenly interpreted it as requiring a return to the discredited rule of *lex loci delicti*. *Kell v. Henderson*, 47 Misc. 2d 992, 994, 263 N.Y.S.2d 647, 649 (Sup. Ct. 1955). "The Court, in that case [*Dym*], held that the law of the place of the accident must govern."